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No. 88-1344

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JULIE MIRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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The Second Circuit found that petitioner Miron's immunized testimony was used against him by the government and held that his rights under 18 U.S.C. § 6002 and the Fifth Amendment were therefore violated. (A8). But the court of appeals nevertheless excused these violations because Miron's testimony was not crucial to the district court's decision to grant the electronic surveillance application, given the other supporting evidence presented to that court. The government's constitutional and statutory violations were thus deemed harmless because, although Miron was admittedly compelled to be a witness against himself, he was not the *only* witness.

Throughout its brief, the government attempts to mislead this Court by couching the issue in terms of whether petitioner's immunized testimony was actually used against him *at trial*. *See, e.g.*, Government's Brief ("GB") i, 9, 13, 14 n.4. No one suggests that it was. The government would apparently have this Court reconsider its holding in *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), that 18 U.S.C. § 6002 is "a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." The government's position would also require repudiation of *New Jersey* v. *Portash*, 440 U.S. 450 (1979) (GB 14 n.4), where a conviction was overturned even though the government never used the defendant's testimony against him in *any* proceeding or warrant application, but merely *threatened* such use. *See* Petition for Certiorari ("Pet.") 15-16.

In defending the judgment below, the government's brief in opposition parses various Fourth Amendment precedents and offers an analysis that might be relevant to deciding, on the

merits, what sort of harmless error rule — if any — should be applied to governmental use of immunized testimony in violation of the Fifth Amendment. But the government does not respond to petitioner's argument that this issue, however it may ultimately be decided, warrants the plenary attention of this Court. The government thus all but concedes that it is a question of surpassing importance, and an issue of first impression in this Court, whether violations of § 6002, of the Fifth Amendment's Self-Incrimination Clause, and of the Due Process Clause as it pertains to prosecutorial promises, may be excused on the theory that, in hindsight, the government's admitted use of a defendant's immunized testimony did not decisively tip the scales against him.

1. The government does not deny that, as Judge Altimari pointed out below, "the Supreme Court . . . has [n]ever held that the harmless error rule applies when, as in this case, there is a violation of the privilege against self-incrimination." (A34-35).[1]

2. The government does not deny that this Court unanimously rejected just such a "harmless in hindsight" argument as insufficient to excuse breach of a prosecutor's promise to a defendant in *Santobello* v. *New York*, 404 U.S. 257 (1971). The conviction in that case was vacated even though the prosecutor's violation did not "make a particle of difference" in the trial court's decision, *id.* at 259.

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[1] The lower court cases relied upon by the government (GB 14) were anticipated and distinguished in the Petition for Certiorari at 16 n.12. The government does not even attempt to rehabilitate its inapposite authorities. This failure is unsurprising, given that those cases confirm that it is "incumbent upon [the government] . . . to demonstrate . . . that [the defendant's] immunized testimony was not used by federal officials either directly or as an investigatory lead," *United States* v. *Hampton*, 775 F.2d 1479, 1487 (11th Cir. 1985). *See also United States* v. *Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983) (government has "the 'affirmative duty to prove' that the defendant's testimony [was] not . . . used against him in any respect") (citation omitted). Precisely this sort of unlawful investigative use was found by the court below.

3. The government does not deny that the decision below is in direct conflict with the courts of appeals in five other circuits, which have held *Santobello* applicable to prosecutorial grants of *use immunity* like that conferred on petitioner Miron. *See* Pet. 22-23 & nn. 15-18. The government does not adduce a single case holding *Santobello* to be *in*applicable in such circumstances. Although the government asserts that *Santobello* should be disregarded in such cases, it offers no explanation of *why* prosecutorial promises of use immunity to witnesses appearing before grand juries should be exempt from the due process principles reaffirmed in *Santobello*. *See* GB 14-15.

4. The government does not deny that the decision below creates an incentive for government to use a witness's immunized testimony against him in a warrant application or as an investigatory lead by gambling that it will ultimately be able to convince a reviewing court that such testimony was unnecessary surplusage and that the government's violation of the Fifth Amendment and the use-immunity statute was therefore gratuitous and harmless. *See* Pet. 12-13. Nor does the government deny that this is precisely the sort of perverse incentive structure that concerned so many members of this Court in *Murray* v. *United States*, 108 S.Ct. 2529 (1988), and *Segura* v. *United States*, 468 U.S. 796 (1984).

5. It is no answer for the government simply to assert, repeatedly, that Miron is in the same position he would have been in had he never testified under immunity. *See, e.g.* GB 9, 10, 15-16 n.6. As previously explained (Pet. 18-20), petitioner *would indeed have been better off* refusing to testify under the diluted grant of immunity sustained by the court below, for any resulting judgment of contempt would have been appealed and overturned because of that grant's constitutional inadequacy. And the government offers no answer to the argument that a grant of use immunity fails to satisfy the Fifth

Amendment if, instead of assuring a witness that he will not be compelled to incriminate himself, it provides that he *may* be forced to incriminate himself — so long as the prosecution ultimately adds enough incriminating evidence from other, untainted sources.

6. This watered-down "immunity" is not only insufficient under the Fifth Amendment, it is also insufficient to fulfill the congressional purpose underlying § 6002 — inducing reluctant witnesses to give testimony essential to the war on organized crime. *See* Pet. 26-30. In his dissent Judge Altimari explained that, "[a]s a practical matter," the judgment below "means that witnesses granted 'use' immunity in the future will think twice about testifying truthfully (or at all) rather than run the risk that the government will later be able to use the 'immunized' testimony against them." (A36). The government, seemingly oblivious to the lasting damage that sustaining this one conviction may wreak on the use-immunity regime crafted by Congress, nowhere addresses this threat to § 6002 as a viable law enforcement tool.

7. This adverse impact on law enforcement reveals a fundamental difference between the Fifth Amendment jurisprudence at issue here and the Fourth Amendment exclusionary rule doctrines that the government would so casually extend. Fifth Amendment immunity is *forward*-looking: it confronts the defendant before evidence is gathered, when the prosecution obtains a judicial order compelling testimony and turns to the witness saying, "talk to us, we won't use it against you."[2]

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[2] As an alternative ground for upholding the judgment below, the government offers the argument — rejected by the court of appeals — that the Fifth Amendment privilege does not apply to crimes committed after immunized testimony has been given. (GB 16-17). This argument was anticipated in the Petition for Certiorari at 7 n.5, to which the government has no answer. The proposition that Miron's participation in the Gambino family's labor racketeering enterprise is excluded from the Fifth Amendment privilege because it does not constitute a continuing course of criminal conduct under *United States* v.

Whatever its compatibility with the Fourth Amendment exclusionary rule, an after-the-fact harmless error inquiry is incompatible with Fifth Amendment immunity, where any announcement that unlawful use of such testimony may later be excused would fatally undermine the credibility of the prosecution's promise, creating a substantial risk that future grants of "immunity" will yield silence or deceptive answers rather than valuable, accurate testimony. The government is unable to deny that the judgment below will have precisely this result, and that this prospect warrants the plenary attention of this Court.

Accordingly, a writ of certiorari should issue.

Respectfully submitted,

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Apfelbaum, 445 U.S. 115, 129 (1980), *see* GB 16-18, is in any event frivolous. The indictment in this case charged a RICO conspiracy beginning in 1967 (CA 29), and the government argued to the jury and to the trial court during sentencing that the particular acts for which Miron was convicted are typical of his "15 years" of participation as an "associate" in the Gambino labor racket. (CA283; Trial Transcript 907-09).